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IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC. *et. al.*

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

*Respondents.*

## MOTION OF NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

## IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF CALIFORNIA and BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS

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## MOTION OF NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF CALIFORNIA

The National Association of Broadcasters ("NAB") hereby respectfully moves for leave to file the attached brief as amicus curiae in support of the petition in this case for a writ of *certiorari* to the Supreme Court of California. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent has been requested and has been refused.

NAB is the principal trade association for the broadcast industry. Its membership includes 4,653 radio stations and 650 television stations located in all 50 states and in United

States possessions. NAB's public service activities include, most notably, development of the Code of Practice, which is the basis for the industry's voluntary self-regulation.

NAB has a staff of over 100 employees and provides a full range of services to its members including engineering, managerial and programming assistance. It serves as a clearinghouse for minorities seeking jobs in the industry and is developing a "matching grant" program to assist minorities in acquiring ownership of broadcast stations. Amicus NAB is the principal industry spokesman to Congress and to the Federal Communications Commission. It also keeps its members and the industry as a whole advised of legal developments affecting broadcasting.

NAB seeks to file a brief as amicus curiae to apprise this Court of the extent to which the decision of the California Supreme Court departs from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and from the case law developed throughout the United States pursuant to *Gertz*. Petitioners have not cited authorities demonstrating the magnitude of California's divergence from *Gertz* and its progeny. NAB also wishes to apprise this Court of the extent to which the decision below will impede broadcasters in discharging their obligations to inform the public about questionable merchandising techniques and products.

April 18, 1980

Respectfully submitted,

By _____
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Stephen Nevas
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**BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF CALIFORNIA**

Because the members of the NAB are licensees of the public airwaves, they have a statutory obligation to broadcast programming that meets the "public interest, convenience and necessity". 47 U.S.C. § 307. This imposes upon them a duty to provide such programming as news, public affairs, public participation and editorials. NAB members have long recognized that, if they are truly serving the public interest, their programming may often be controversial and even provocative. Presently, however, there is increasing concern among NAB members over the growth in defamation suits against broadcasters. The cost of defending these suits is intimidating to broadcasters and can be crushing. The obvious and natural effect of expensive defamation litigation is to dampen the ardor of broad-

casters for providing the strong public affairs programming that the public needs and deserves.

Amicus NAB and its members are keenly interested in the disposition of this case because it will impact directly on the quantity and seriousness of defamation actions they will face and, therefore, on the extent to which they can offer one of their most important types of programming, namely, consumer affairs reporting. If the California Supreme Court's decision remains precendent, the ability of broadcasters to program consumer affairs reporting will be severely impaired.

The reports in issue are classic examples of consumer affairs reporting. According to the opinion of the California Supreme Court, petitioner broadcasters informed the public of the results of an independent investigation conducted at a highly respected, 122-year-old department store. The reports warned the public to exercise care while shopping at the store's closeout sale because the Better Business Bureau had found both merchandise of inferior quality and claims of savings that were highly misleading. The reports were especially valuable to the public because, once the store closed its doors, dissatisfied purchasers would be left without an effective remedy.

Notwithstanding the importance to consumers of the news reports in issue, the California Supreme Court's holding was that petitioners were not entitled to the protection of the actual malice standard because consumer affairs reporting itself is not worthy of the standard's protection:

> "Criticism of commercial conduct does not deserve the special protection of the actual malice test." (25 Cal. 3d 763, 770, 160 Cal. Rptr. 97, 603 P.2d 14 (1979).)

Thus, under the decision of the California Supreme Court, the actual malice standard can have no application to consumer affairs reporting in California or in any other jurisdiction that looks to California for guidance. This is true regardless of whether the plaintiff is a public figure. If this Court permits the decision to stand, broadcasters will be stripped of the actual malice standard's protection and will become unduly vulnerable to those who defraud or endanger the public with deceptive merchandising practices or defective products. Without the protection of the actual malice standard, marketplace profiteers will convincingly threaten broadcasters with expensive and harassing lawsuits and thereby attempt to supress information that alerts the public to their practices.

Amicus NAB and its members believe strongly that the decision of the California Supreme Court is a major impediment to broadcasters seeking to discharge their obligation to arm the public with knowledge about market-place predators. Amicus, therefore, has a strong and immediate interest in urging this Court to issue a writ of *certiorari* so that it may review, and ultimately reverse, the California Supreme Court's decision.

## REASONS FOR GRANTING THE WRIT

The first issue is whether broadcasters who provide consumer affairs reporting will be denied the protection of the actual malice standard in defamation actions regardless of whether the plaintiff is a public figure. This issue is squarely presented because the California Supreme Court held that the actual malice standard has no application to any consumer affairs reporting whatsoever. According to the court, the subject matter itself is inherently unworthy of protection.

Amicus NAB shows herein that courts other than the California Supreme Court regularly apply the actual malice standard in defamation actions arising out of consumer affairs reporting. California is unique in its failure to value a class of reporting that is praised in other jurisdictions for the assistance it affords the public.

Amicus further shows herein that the California court's decision directly contravenes *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and thereby violates the First and Fourteenth Amendments to the U.S. Constitution as well. The "subject matter" test applied – or, more accurately, misapplied – by the California Supreme Court was specifically rejected in *Gertz*.

The second issue of concern to amicus NAB arises from the holding of the California Supreme Court that there is no distinction between a corporate and an individual plaintiff for purposes of a defamation action. Amicus NAB establishes herein that a difference does exist. Corporations cannot suffer shame, humiliation or other mental anguish. Under the reasoning of *Gertz*, this difference justifies requiring corporate defamation plaintiff to prove actual malice whenever they are engaged in matters of legitimate public interest.

## 1. The California Supreme Court Misapplied an Unconstitutional Test in Holding that Consumer Affairs Reporting Does Not Merit the Protection of the Actual Malice Standard

### A. Courts other than the California Supreme Court regularly apply the actual malice standard in defamation actions arising out of consumer affairs reporting.

Counsel for NAB knows of no court other than the California Supreme Court that has denigrated or even questioned the value of consumer affairs reporting. Quite the contrary is true. Numerous courts have recognized the necessity of such reporting if the public is to be protected from those who would prey upon it. In their petition for writ of *certiorari,* petitioners quote from several cases which the California Supreme Court itself cited approvingly and which praise consumer reporting.

Courts other than the California Supreme Court uniformly apply the actual malice standard where the underlying news reports are consumer oriented. *E.g., Yiamouyiannis v. Consumers Union,* 5 Med. L. Rep. 1174 (S.D.N.Y. May 30, 1979) (health hazards of water flouridation); *Steaks Unlimited, Inc. v. Deaner,* 468 F. Supp. 779 (W.D. Pa. 1979) (method of selling and quality of meat sold to public, *citing, inter alia,* the California Court of Appeal opinion in this case); *Hoffman v. Washington Post Co.,* 433 F. Supp. 600 (D.D.C. 1977), *aff'd,* 578 F.2d 442 (D.C. Cir. 1978) (efficacy of protein tablets as dietary supplements); *Trans World Accounts, Inc. v. Associated Press,* 425 F. Supp. 814 (N.D. Cal. 1977) (techniques of debt collecting corporation); *Reliance*

*Insurance Co. v. Barron's,* 442 F. Supp. 1341 (S.D.N.Y. 1977) (corporation's preliminary prospectus and proposed stock offering); *American Benefit Life V. McIntyre,* 375 So.2d 239 (Ala. Sup. Ct. 1979) (solvency of insurance company); *Bindrim v. Mitchell,* 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied,* 100 S. Ct. 490 (1979), *reh. denied,* 100 S. Ct. 713 (1980) ("nude marathon" group therapy); *Korbar v. Hite,* 43 Ill. App. 3d 636, 357 N.E.2d 135 (1976), *cert. denied,* 434 U.S. 837 (1977) (operation of a credit union); *Silence v. Journal Star Printing Co.,* 201 Neb. 159, 266 N.W.2d 533 (1978) (presence of drugs in restaurant food); *Childs v. Sharon Herald,* 5 Med. L. Rep. 1679 (Pa. Ct. C.P. July 23, 1979) (legality of conduct of bailbond industry).

Courts other than the California Supreme Court also apply the actual malice standard to criticism of those who criticize commercial conduct. *E.g., Edwards v. National Audubon Society,* 556 F.2d 113 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977) (scientists who publicly advocated use of DDT); *Gibson v. Maloney,* 231 So. 2d 823 (Fla. App.), *cert. denied,* 398 U.S. 951 (1970) (newspaper publisher who aroused public against interests controlling a local telephone company); *Beatty v. Ellings,* 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. denied,* 398 U.S. 904, *reh. denied,* 399 U.S. 917 (1970) (individual opposing urban renewal project); *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.,* 46 N.Y. 2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979) (humane organization accused of slaughtering seals to inflame public against fur industry); *Nader v. De Toledano,* 408 A.2d 31 (D.C.C.A. 1979) (consumer advocate accused of falsifying and destroying evidence to generate controversy over an automobile); *Exner v. American Medical Association,* 12 Wash. App. 215, 529 P.2d 863 (1974) (doctor who opposed flouridation).

Amicus NAB has no explanation for the California Supreme Court determination to single out consumer affairs reporting as unworthy of the actual malice standard's protection. The public needs information to protect itself from those who may sell deceptively and who may offer defective, dangerous products. What the California Supreme Court decision does is to arm marketplace malefactors with a bludgeon for use against broadcasters. By threatening protected, expensive, harassing litigation, they will seek to still the flow of information to the public about their activities. The result will be injury to the public.

### B. Not only did the California Supreme Court misapply the "subject matter" test for application of the actual malice standard, the standard itself is unconstitutional.

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), took courts out of the business of determining " 'what information is relevant to self-government' ". 418 U.S. at 346. The holding in *Gertz* was that the First Amendment to the U.S. Constitution required application of the actual malice standard in all defamation actions against communications media where the plaintiff was a public figure or official. Under *Gertz* it is not the subject matter of the allegedly defamatory communication that determines application of this standard, but the character of the plaintiff as a public or private individual.

Here, the California Supreme Court paid lip service to *Gertz* but refused to apply its holding. Rather than consider the character of the plaintiffs, it focused on the subject matter of the communication. It refused to apply the actual malice standard because it did not believe that criticism of commercial conduct merited protection.

That *Gertz* is intended to bind the states is apparent from the opinion itself. It states specifically that states are free to deny broadcasters or publishers the protection of the actual malice standard only when the plaintiff is a private individual. 418 U.S. at 347. That this Court acted wisely in taking the judiciary out of the business of determining the worth of communications is apparent from the decision of the California Supreme Court reached an entirely anomalous result when it focused on the subject matter of the communication rather than the character of the plaintiff. It excluded from the protection of the actual malice standard a type of programming that is generally considered to possess the highest worth.

**2. In Refusing to Distinguish Between Individual and Corporate Defamation Plaintiffs, the California Supreme Court Failed to Apply the Reasoning of Gertz v. Robert Welch, Inc.**

The California Supreme Court refused to distinguish between individual and corporate defamation plaintiffs and held as follows:

> "[T]here is no distinction between protectable interest and reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages." (25 Cal. 3d 763, 770, 160 Cal. Rptr. 97, 603 P.2d 14).

The California Supreme Court's holding fails to recognize the obvious principle long recognized at common law that a corporate defamation plaintiff, unlike a natural person, cannot suffer mental anguish. *See, e.g., Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, 378 F.2d 377 (5th Cir. 1967); *National Refining Co.*

v. *Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927); *Security Benefit Association* v. *Daily News Publishing Co.*, 299 F. 455 (8th Cir. 1924); *Golden Palace, Inc.* v. *National Broadcasting Company*, 386 F. Supp. 107 (D.D.C. 1974), *aff'd*, 530 F.2d 1094 (D.C. Cir. 1976). Corporations do not have sleepless nights.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court recognized that the "public figure" test represented an accommodation between the societal need to avoid self-censorship by the news media and the right of an individual to claim compensation for injury caused by defamatory falsehoods. 418 U.S. at 341. Because corporations can only sustain monetary injury and not mental anguish, they need less protection than individuals and it is necessary to strike a different accommodation between the competing forces identified in *Gertz*. Less weight need be given to protecting corporate defamation plaintiffs and more to the societal need of avoiding media self-censorship. Although the right of a corporation to seek compensation for financial injury is important, this Court noted in *Gertz* that the Court was "especially anxious to assure to the freedoms of speech and press the 'breathing space' essential to their fruitful exercise". 418 U.S. 342.

As noted in the petition for writ of *certiorari*, a United States District Court in *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976), struck the accommodation between the competing interests where, as here, the defamation plaintiffs are corporations. So long as the communication in issue concerns a matter of legitimate public interest, the court in *Martin Marietta* held that a corporate defamation plaintiff must prove actual malice. Amicus NAB supports this as a standard of liability. It provides adequate protection to cor-

porations while recognizing the importance of maintaining communications media that can inform the public of deceptive practices and dangerous products.

## CONCLUSION

As the principal spokesman for the broadcast industry, Amicus NAB urges that this Court grant the petition for a writ of *certiorari.* The decision of the California Supreme Court fundamentally misinterprets *Gertz* v. *Robert Welch, Inc.* and, in so doing, jeopardizes the ability of broadcasters to program consumer affairs reporting. Without the protection of the actual malice standard, broadcasters will have a tendency to exercise greater self-censorship and the public will lose an important source of knowledge.

Date: April 18, 1980

Respectfully submitted,

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